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Supreme Court of the United States.

October Term 1905.

No. 226.

GILA BEND RESERVOIR AND IRRIGATION COMPANY,
Appellant,

vs.

GILA WATER COMPANY,
Appellee.

APPELLEE'S BRIEF.

C. F. AINSWORTH,
Attorney for Appellee.

Supreme Court of the United States.

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vs.
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STATEMENT OF CASE.

This action was brought by the appellant alleging that it was the owner in fee simple of the property described in the complaint, and that the appellee and others therein named and made parties to said action, had no right, title or interest in said property or any part thereof, and demanded judgment that the title to said property be quieted in appellant. All of the defendants in the trial court, except the Gila Water Company filed disclaimers and judgment was rendered by the court in their favor, on the same.

The Gila Water Company by its amended answer denied that the appellant had any right, title or interest whatever in the property mentioned in its complaint, and by way of cross-complaint alleged that it was in the possession of the property and was the owner in fee simple of the same, and demanded judgment that it be adjudged to be the owner in fee simple of the said property and that the title thereto be quieted in the Gila Water Company,

and that the appellant be forever barred and estopped from hereafter claiming any right, title or interest in the said property or any part thereof.

Appellant filed a reply to the said cross-complaint of the Gila Water Company denying its title to said property, and upon the issues so formed, the action was tried by the trial court and judgment rendered in favor of the appellee herein, the Gila Water Company, dismissing the appellant's action and decreeing the appellee herein, the Gila Water Company, to be the owner in fee simple and in posession of all the property described in appellant's complaint and perpetually enjoined the appellant herein, the Gila Bend Reservoir and Irrigation Company, from ever asserting any right, title or interest to the same, adverse to the right, title interest of the Gila Water Company (Transcript Record, folios 14, 15).

From this judgment the Gila Bend Reservoir and Irrigation Co. appealed to the Supreme Court of Arizona where that Court affirmed the judgment of the trial court in the following opinion and judgment:

> "Upon the trial the Gila Water Company introduced in evidence to sustain its claim of title to the property in controversy, the record and judgment in a suit in which one W. H. Linn and others were plaintiff's and the Gila Bend Reservoir and Irrigation Co., and others were defendants, and known on the docket of the District Court of Maricopa County, where the suit was brought, as case number 1996.
>
> "The plaintiff, the Gila Bend Reservoir and Irrigation Company objected to the introduction of this judgment and record upon the ground of certain irregularities appearing upon the face of the record which it claimed rendered the judgment open to attack in this proceeding. The rulings of the trial court, in admitting this record and judgment, constitute the essential grievance of the appellant.

"It appears that in the District Court of Maricopa County, in the year 1893, the appellant brought suit against the Peoria Canal Company and the Arizona Construction Company and applied for a receiver therein to take possession of the property in controversy in this action. Thereafter the Court appointed one James McMillan as such receiver who took possession of the property and, by leave of the Court, issued a large amount of receiver's certificates to meet the expenses of necessary improvements upon the property. This suit was docketed as number 1728. Pending this action, one W. H. Linn, and others brought suit in the District Court of Maricopa County, against the appellant and other defendants, alleging in their complaint, among other facts, the pendency of action number 1728, the appointment of the receiver and the issuing of the receiver's certificates, and praying among other things that the assets of the Gila Bend Reservoir and Irrigation Company be marshalled and that the receiver take possession of and be directed to sell the property of the said company and from the proceeds of said sale pay the debts adjudged due against it.

"All the parties to this suit including the Gila Bend Reservoir and Irrigation Company, appeared and aswered. A trial was had and judgment was rendered in which the receiver was directed to sell the property. The record further discloses that a sale was made under this judgment by the receiver, which was affirmed by the court, and a deed executed by the said receiver to the purchaser, who was one of the grantors of the appellee. This judgment was appealed from to this court where it was affirmed, and subsequently an appeal was taken by the appellant to the Supreme Court of the United States where the judgment of this court was affirmed. The latter suit in the court below was docketed as number 1996. The objection which the appellant urged in the court below to the judgment in cause number 1996 was that it appears upon the face of the record that the judgment, ordering a sale of the premises by the receiver, was without jurisdic-

tion and void for the reason that no order was made by the court extending the receivership in suit number 1728 to cause number 1996. In passing upon this objection the trial court pointed out that all the parties in cause number 1728 were parties in cause number 1996, that, when the latter suit was brought, the property was in the hands of the court, through its receiver, and that after the bringing of cause number 1996, the record disclosed that the court and all the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in posession of the receiver, appointed in cause number 1728, as though it had been placed in his possession as a receiver appointed in cause number 1996, and, further that orders were made by the court concerning said receivership which were entitled in both suits jointly, and held that, although no order was made consolidating the two suits and no order was in terms, made extending the receivership to second suit, number 1996, the receivership was in fact extended to the second suit, and that the court by its action, ratified the acts of the receiver in the second suit and thereby, in effect, extended his power and authority as such receiver to said second suit.

"The view thus taken is amply justified by an inspection of the record in the two suits, and upon this ground alone the action of the trial court, in admitting the judgment, was correct.

"The trial court did not err for another reason. The failure of the court, in case number 1996, to enter a formal order extending the receivership from cause number 1728 to cause number 1996, was not one which rendered the judgment complained of void upon its face but was a mere irregularity of practice which should have been taken advantage of during the pendency of the action.

"As said by Mr. Justice Miller in Cooper vs. Reynolds, 10 Wallace, 308: "It is of no avail to show that there are errors in the record, unless they be such as to prove that the court has no jurisdiction in the

case, or that the judgment rendered was beyond its powers. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law.

"In Cornett vs. Williams, 20 Wallace, 226, we find this expression of the Supreme Court: 'The settled rule of law is that jurisdiction having attached to the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached by fraud.'

"It was within the power of the court to have extended the receivership in cause number 1728 to cause number 1996. It having jurisdiction of the property and the parties, the appellant had a right to object to the extension of the receivership so as to cover both cases without a formal order made and entered in that behalf. It could likewise have moved to set aside the judgment for this or any other irregularity that affected it. If it did not take any such action it must be held to have waived the error. If it took any such action, the ruling of the court thereon, having been reviewed by this court and the Supreme Court, can not now be reviewed in this suit, and the judgment in cause number 1996, was conclusive and not subject to collateral attack by appellant.

"The judgment is affirmed."

(Transcript of Record, pages 38 to 40 inclusive) and from the judgment of the Supreme Court of Arizona the appellant appeals to this court.

A statement of facts in the nature of a special verdict, was made by the Supreme Court of Arizona (Transcript of Record, pages 45, 46). The principal finding after stating the record is as follows:

"That from the foregoing record and facts, the court finds that plaintiff and appellant herein, Gila Bend Reservoir and Irrigation Company, a corpora-

tion, has not and did not have at the commencement of this action any cause of action in respect to, nor did it have and has not now any right, title or interest in and to the property or any part thereof mentioned and described in the complaint herein; that the defendant-appellee, Gila Water Company, a corporation, was at the time of the commencement of this action and is now owner in fee simple and in possesion of all the property mentioned and described in plaintiff's complaint herein."

The evidence introduced by the appellee in the trial court traces the title to the property in question from the United States Government down to the appellee. This evidence is composed of record evidence read into the record and taken down by the court reporter, and exhibits filed therein, none of which appears to be set out in the bill of exceptions or in the transcript of record, and the reporter's notes were not transcribed and filed so as to make them a part of the record.

The appellant in this action is attempting to raise the question as to the validity of the judgment rendered against it in a former suit, in which it and other parties, and under which judgment the property in question was sold and by mesne conveyances passed to the appellee. The only contention on the part of the appellant herein is the invalidity of the former judgment of this court, through which the appellee deraigns title to the property in question

The history of the litigation in the suit referred to is substantially as follows:

The appellant, the Gila Bend Reservoir and Irrigation Company, brought suit against the Peoria Canal Company, and the Arizona Construction Company, known as suit No. 1728, in which suit the court took possession of the property mentioned in the complaint herein and appointed a receiver to take charge thereof, one James McMillan. In

this suit the receiver was ordered by the court to issue receiver's certificates to improve the property. The receiver issued receiver's certificates to the amount of $120,000.00 and while this suit was pending and before any judgment thereon was rendered, another bill in equity was filed in the same court, known as case No. 1996, in which W. H. Linn and others were plaintiffs and the Gila Bend Reservoir and Irrigation Company and others were defendants, making all the parties to the former suit parties to the second suit together with additional parties that were interested in the property. In this bill it was alleged among other things, the pendency of the other action, the appointment of the receiver, the issuing of the receiver's certificates and that the court had taken possession of the property and was managing and operating it through its receiver, and among other things prayed the court to marshal the assets and liabilities of the said corporation and to cause the said receiver to take possession of the said assets, and to ascertain the debts existing against the property of the said corporation for the construction, maintenance and operation of the same and also the order of priority of such indebtedness and that judgment be rendered establishing such priority, and that the receiver be directed to sell the property and out of the proceeds to pay the debts so adjudged due against the said corporation, in the order of their priorities. All the parties to that action appeared and answered. Judgment was rendered thereon in accordance with the prayer of the complaint and the receiver directed to sell the property. From the amended judgment entered therein appellant herein appealed to the Supreme Court of Arizona, where the judgment was affirmed and from that court appealed to this court where the judgment of the Supreme Court of Arizona was affirmed. (171 U. S. 685, Gila Bend Reservoir and Irrigation Company vs. Linn.)

Thereupon in pursuance to the judgment the receiver sold the property in question, the sale was confirmed by the court and a deed executed by the receiver to the grantors of this appellee the Gila Water Company.

After the second suit was brought, the court through all the proceedings treated the actions as consolidated and all orders were made with the title of both suits. After the suit 1996 was determined by this court the appellant herein resurrected the suit No. 1728 in the District Court, whereupon the court rendered judgment against the appellant and in favor of the defendants, therein dismissing appellant's action and for costs. From this judgment appellant appealed to the Supreme Court of Arizona and the Supreme Court of Arizona affirmed the judgment of the court below, and upon request of the plaintiff and appellant herein for a statement of facts in the nature of a special verdict, the statement was made and filed among which is the following:

> "The plaintiff has not been injured or damaged by any acts of receiver James McMillan or defendants.
>
> "All acts and doings of receiver James McMillan have been under orders and judgments of the court apointing him as such receiver and that said receiver was in possession and full control of all the property involved in this action when ordered by the court in said suit No. 1996 to sell the same, and all the parties hereto were parties to said suit No. 1996, in which all the rights of plaintiff in said property were at issue and as fully determined as they could have been in this action." (T. R., p. 27).

The appellee, the Gila Water Company, denies that it deraigns its title to the property in dispute here, through the plaintiff and denies that at any time the plaintiff had any right or title to the property described in the complaint.

The only property ever owned by the plaintiff was the quarter section of land set out in the complaint (Folio 1, T. R.,) and some water appropriations and this was conveyed by the appellant to the Peoria Canal Company, June 16, 1893, (T. R., Folio 20).

The principal error complained of in the court below, by appellant was the admission by the trial court in evidence of the judgment and record in case No. 1996, (T. R., Folio 41) and we assume that will be the error assigned in this court, not having seen appellant's brief.

Before entering on the argument of the questions of law involved in this appeal, we desire to call attention to the record as presented to this court.

1st. To the statement of facts as found on pages 45, 46, Transcript of Record and move the court to strike out and disregard all that portion thereof reading as follows:

> "That this Supreme Court adopts and makes a part of this statement of facts the Bill of Exceptions in this case, Part I, Exceptions; Part II, Circumstances and Evidence, as certified and signed on the 24th day of November, 1902, by Hon. Edward Kent, the Presiding Judge who tried this cause below, the same as if it were set forth at length herein:"
>
> "That no order was made in the court below consolidating the case known as No. 1728 in the trial court and the case known as No. 1996 in the same court, said cases being those the record of which is referred to in the above mentioned Bill of Exceptions."
>
> "That the receiver appointed in said case No. 1728 made the sale and executed the deed under which the Gila Water Company, appellee, claims title to the property in dispute; that no order was in terms made extending the receivership in said case No. 1728 to said case No. 1996, the latter case being the one in which said receiver made said sale and by the judgment

rendered therein assumed to convey the title to said property; that the only orders made in said case No. 1996 relating to said receivership are those dated May 29, 1894, November 23, 1898, July 21 1894, November 20, 1894 and January 10, 1895, referred to in said Bill of Exceptions."

For the reason that these portions of the record do not comply with Sub. 3, Rule 8, of this court in this, it is incomplete in itself and refers to other papers, exhibits, and proceedings.

2d. To the Bill of Exceptions on pages 15 to 30 inclusive of the Transcript of Record and move to strike out the same, for the reason that this part of the record is incomplete, in not containing in itself, but only by reference the papers, exhibits, depositions, evidence, and other proceedings which are necessary to the hearing in this court, and is in direct violation of Sub. 3, Rule 8, of this court.

ARGUMENT.

(b) The argument of the questions involved on this appeal may for the purpose of succinctness and clearness be divided into four subdivisions or heads:

1st. The scope of the review of the judgment of the Supreme Court of Arizona.

2d. The right of the appellant to attack the judgment of this court in a former suit, to which it was a party and through which judgment defendant and appellee deraigns its title.

3d. The validity of that judgment and its binding effect on the court below and this court.

4th. The appellant not having established any title to the property, can not as against the appellee in possession question the title of the appellee.

FIRST.

The Supreme Court of Arizona having made a statement of facts in which it finds, that the appellant has not and did not have at the time of the commencement of this action, any cause of action in respect to nor did it have and has not now any right, title or interest in and to the property, or any part thereof, mentioned and described in the complaint herein; and that the appellee was at the time of the commencement of this action and is now the owner in fee simple and in possession of all the property mentioned and described in plaintiff's complaint herein, we contend that these finding are conclusive in this court as to the questions here presented.

This court has repeatedly held that on appeals from the Supreme Court of the Territories to this court that the facts set forth in the statement of facts which comes up on an appeal are conclusive in this court.

Hight vs. Boughton, 105 U. S. 235 on 236.
Harrison vs. Peria, 168 U. S. 311 on 323 and cases there cited.

We therefore submit that on the facts thus found by the Supreme Court of Arizona the judgment of the court below should be affirmed.

SECOND.

THE APPELLANT CAN NOT ATTACK THE VALIDITY OF THE JUDGMENT OF THIS COURT IN A FORMER SUIT, THROUGH WHICH JUDGMENT APPELLEE DERAIGNS ITS TITLE.

Our contention is that an attack upon the judgment rendered by the District Court and afterwards on appeal af-

firmed by this court, in case No. 1996, in the court below, is a collateral attack, and that such judgment can not be so attacked, but that it is binding upon the court below and that it could not have refused to give full credit, and that being true, the title of this appellee coming as it does through that judgment, must be affirmed and quieted in it.

Van Fleet on Collateral Attack, at Section 3 has this to say upon this point:

> "When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack. Familiar instances are where a person relies on a judgment to show his right or title in a suit to quiet title. That the objection to the judgment for judicial errors in such cases is a collateral attack, the cases all agree, hence citations are useless."

It is a well settled rule that the final judgments of a court can not be attacked in a collateral proceeding, but that if it is in any way erroneous, the same must be rectified in a direct proceeding for that purpose.

In his work on Collateral Attack, Judge Van Fleet, on page 29 thereof, lays down the following rule:

> "Jurisdiction existing any order or judgment is conclusive in respect to its own validity in a dispute concerning any right or title derived through it, or anything done by virtue of its authority."

This rule is borne out by the decisions in the following cases, to which we respectifully call the attention of the court:

> Cornett vs. Williams, 20 Wallace 226.
> Black on Judgments, 1st Ed. Sec. 245.
> Harris vs. Lester, 80 Ill. 307.

McGoon vs. Scales, 9 Wall. 23.
Wood vs. Bayard, 63 Pa. St. 320.
Gunn vs. Plant, 94 U. S. 664.
Hendrick vs. Whittemore, 105 Mass. 23.
Lee vs. Kingsbury, 62 Am. Dec. 546 (Tex.)
Yoeman vs. Younger, 83 Mo. 424.

From the above authorities it follows that the judgment through which the appellee deraigns its title to the property in question is conclusive upon the court below and also upon this court, unless the court rendering the judgment had no jurisdiction of the subject matter of the action, or the persons of the parties, and unless such lack of jurisdiction is shown that judgment is final and conclusive and it can not be disturbed in any way in a collateral proceeding, but must stand, and full credit as to its validity extended to it.

The court below in the action in which the judgment now under discussion (Linn et al vs. Gila Bend R. &. I. Co. No. 1996) was rendered decided that it had jurisdiction of the parties and subject matter, see folio 250, page 208, case 198, Supreme Court of the U. S., Oct. Term 1897, which is as follows:

(Title omitted).

"This cause having been tried by the court upon the complaint and separate answers of the several defendants herein and the court having made and entered its decree herein on the 21st day of July, A. D. 1894, and the defendants herein C. E. Crowley and Redmond Toohey, by C. F. Ainsworth, their attorney, having moved the court to amend said decree rendered herein, as aforesaid, and due notice having been given to all parties interested in said decree, and the court being fully and sufficiently advised in the premises, and all the parties to this action having appeared in court, either in person or by attorney.

"NOW THEREFORE, it is by the court considered, ordered and adjudged that the said decree made herein on the 21st day of July, A. D. 1894, be and the same is hereby amended so as to read and be in lieu of the original decree as follows, to-wit:

"It satisfactorily appearing to the court that each and all of the defendants herein have appeared and answered the complaint of the plaintiffs herein, and that the court has jurisdiction of the parties to this action and of the subject matter of this suit, and the court being satisfied by the evidence offered and admitted, etc., etc., etc. * * * IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the court that James McMillan, the receiver heretofore appointed by this court, and now in possession of said premises, under the orders of this court, proceed to advertise the premises and property described in the petition hereinbefore referred to and now more particularly described as follows, to wit:"

(Then follows a description of substantially all the property involved in this suit).

That decision was affirmed by this court, so that the court below can not when the same question is raised again, interfere with either its own decision in the former case or with the affirmance thereof by this court. It is bound by the adjudication of that fact by this court, and it can not now sit in judgment upon the same question for the purpose of in any way interfering with that judgment.

In Clary vs. Hoagland, 6 Cal. 685, the court in its opinion said in part, on page 688:

"It is well settled that when a case has once been taken to an appellate court, its judgment obtained on points of law involved, such judgment, however erroneous, becomes the law of the case, and can not on a second appeal be altered or changed."

In other words it can not be attacked or questioned for the purpose of interfering with it in any way, even in the same action. If this is so in the same action, how much more so must it be if the attack on the judgment is made in an entirely collateral proceeding? We contend that the court having decided that it had jurisdiction, such decision becomes *stare decisis* and can not be questioned by this court, not only upon that ground, but also upon the ground that the court below was bound by the decision of this court on that very question raised in the case in which the judgment was rendered.

In his work on Collateral Attack, Judge Van Fleet, at page 3, lays down the following doctrine, that:

> "Where a court has erroneously held that certain things are sufficient to give jurisdiction, and titles have been built thereon, the doctrine of *stare decisis* forbids the overruling of those decisions."

It is therefore submitted that in view of the decision of the District Court in the case of No. 1996 that it had jurisdiction over the parties and subject matter, and the affirmance thereof by this court, that judgment was conclusive and final and binding upon the court below in this action, and it was the duty of the court below to give full credit to that judgment and that its doing so was not error, but in accordance with the settled rule throughout the country.

Black on Judgments, Sec. 274.
Joyce vs. McAvoy, 31 Cal. 274 on 288.
Maples vs. Mackey, 89 Am. Dec. 448.
Callen vs. Ellison, 82 Am. Dec. 448.
Otis vs. Rio Grande, 1 Woods 279 (U. S.) Fed. case No. 10613.
Foltz vs. St. Louis & S. F. Ry. Co., 60 Fed. 316 on 318 and 319

Jurisdictional facts are conclusively presumed in courts of general jurisdiction even when not found by the court.

Coit vs. Haven, 79 Am. Dec. 244 on 247.

While as a general rule it may be conceded that the jurisdiction of the court rendering the judgment may be questioned in a collateral proceeding, it is nevertheless the fact that such interference can be only by a separate and distinct tribunal, one which is not bound by the adjudication, for to hold otherwise would be to lay down the doctrine that even after an appellate court has found as a matter of fact and law that the parties and subject matter were within and subject to the jurisdiction of the lower court, that tribunal could be asked to nullify such adjudication by the appellate court, and redetermine that question in an entirely collateral issue, without paying any attention to the decision in the action itself. The rule applies chiefly to judgments or sister states or foreign judgments.

On this point we would call the attention of the court to the case of Evers vs. Watson, 156 U. S. 527, in which on page 533 the court in the course of its opinion says:

> "But we do not wish to be understood as holding that, even if jurisdiction had not been apparent upon the record, advantage could be taken of it after a final decree in a collateral proceeding. Thus in Skillern's Ex. vs. May's Ex., 6 Cranch 267, a case which had been reversed by this court and sent back to the Circuit Court, it was discovered to be one not within the jurisdiction of the court; but as it appeared that the merits had been finally decided in this court and its mandate required only the execution of the decree, it was held that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that court was not alleged in the pleadings. So in McCormick vs. Sullivan, 10 Wheat 192, a

prior judgment between the privies in estate was pleaded in bar of the remedy sought to be enforced in the suit then under consideration, and objection was made that the proceedings did not show that the parties to it were citizens of different states, and consequently that the court was without jurisdiction and decree void. It was held, however, that the courts of the United States, though limited, were not of inferior jurisdiction, and that if jurisdiction was not alleged in the pleadings, their judgments and decrees were erroneous and might be reversed for that cause; but that they were not absolute nullities, and that the decree in the former case, while it remained unreversed, was a valid bar to the suit under consideration. To the same effect are Ex Parte Watkins, 3 Pet. 193; Kennedy vs. Georgia State Bank, 8 How. 586. Des Moines Navigation Co. vs. Iowa Homestead Co., 123 U. S. 552, and the recent case of Dowell vs. Appelgate, 152 U. S. 327."

THIRD.

THE JUDGMENT THROUGH WHICH APPELLEE DERAIGNS ITS TITLE IS VALID. THE COURT RENDERING THE SAME HAVING JURISDICTION OF THE PARTIES AND SUBJECT MATTER.

On this point this court is bound by its former adjudication of that fact (in the case of Linn vs. Gila R. R. & I. Co. No. 1996) and it can not now be asked to destroy the titles built upon that decision and its orders thereunder. It is well settled and properly so, that where a court has erroneously held that certain things were sufficient to give jurisdiction, and titles have been built thereon, the doctrine of *stare decisis* forbids the overruling of those decisions. (See Van Fleet on Collateral Attack, page 3). If this is true where the court has erroneously so decided, it certainly is more forcibly so where the same is properly decided.

The only basis for the contention of the appellant as to the non-jurisdiction of the court in the former case, above referred to, is that the receiver who was ordered by the court to sell the property was not by any formal order appointed as such receiver in the case.

This contention is so glaringly absurd a basis for raising the question of jurisdiction that we might confidently allow the matter to rest on its own demerits without further argument.

The court in its findings of fact in the case above cited, recognized the receiver, who was appointed as such in another action between the same parties and concerning the same property, as being the custodian of the property in the second action, and in its judgment considers his receivership extended to the second action and orders and directs him to sell the property, which order was followed and the property subsequently vested in the appellee. It is certainly not a question of jurisdiction, whether the receiver was appointed by a formal order or whether he, being already the receiver of the property, appointed by the court in a former suit between the same parties, was recognized by the court as the custodian of the property for all the parties concerned, and in its judgment and order subsequently made, recognized him as such. The question raised is merely one of procedure in the appointment of the receiver, and while it is usual to extend the receivership by a formal order to that effect the failure to do so certainly raises no question of the jurisdiction of the court, but merely one of procedure, and one which should have been raised in the case itself but can not be now raised in an entirely collateral issue.

In Cooper vs. Reynolds, 10 Wall. 308, this court said:

> "It is of no avail to show that there are errors in the record, unless they be such as to prove that the court has no jurisdiction in the case, or that the judg-

ment rendered was beyond its powers. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law."

In the case of Hunt vs. Hunt, 72 N. Y. 217 on 219, Mr. Justice Folger, writing the opinion, says:

> "Jurisdiction of the subject matter is power to adjudge concerning the general question involved." * *
> "It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."

In Hope vs. Blair, 105 Mo. 85 the court upon this point holds that jurisdiction over the subject matter is the right to grant the relief prayed for. The contention of the appellant as regards the appointment of the receiver which is the sole basis of its attack upon the judgment herein under discussion, surely does not raise any question as to the power of the court to pass upon the merits of the controversy nor of the jurisdiction of the parties to the action. That being so, the court having the power to adjudicate upon the facts presented before it (being the enforcement of certain liens) and all the parties having appeared and submitted to the jurisdiction of the court, it was then and there competent for the court to proceed with the trial of the controversy, and if in the course of the proceedings, some purely formal step was neglected, it was incumbent upon the complaining party to raise the question then and there, and he is estopped after final decree to, in an entirely collateal proceeding, raise the question.

Black on Judgments, Sec. 261.
White vs. Bogart, 73 N. Y. 256 on 259.
Moffit vs. Moffit, 69 Ill. 641.
Brooks vs. Mayor, 10 N. Y. Supp. 773.
Titus vs. Yaples, 80 Am. Dec. (Pa.) 604.

The contention of the appellant is that because the court in action No. 1996, above referred to, failed to appoint a separate receiver or enter an order extending the receivership of the receiver in a former suit between the same parties concerning the same property, that the said court lost jurisdiction over the property. This point was argued and passed upon by the Arizona Supreme Court, and decided in favor of the jurisdiction of the court, and this court afterwards affirmed that judgment so that question can not be now raised (raised by assignment of error No. 67 in case No. 1996, as follows):

Assignments LXVII and LXX of Assignments of Error in case of Linn and others vs. Gila Bend Reservoir and Irrigation Company, known as suit No. 1996:

> "The court erred in decreeing in such amended decree 'that on or before the day fixed for the sale hereunder, this defendant, the Arizona Construction Company, or the Peoria Canal Company, pay to the receiver heretofore appointed by this court such sum as may be necessary to pay the costs of this proceeding and of the execution of this decree by the receiver;' for the reason that no receiver had ever been appointed in this cause, nor had the powers and duties of the receiver appointed in suit No. 1728 (in which this defendant was therein plaintiff and said Arizona Construction Company and Peoria Canal Company were therein defendants, and then and now pending in said court) ever been enlarged sufficient to embrace and cover any such required payment to such receiver; and for the reason that the court was without rightful jurisdiction to order such payment to be so made, and for that the court erred in rendering such amended decree."

LXX.

> "The court erred in rendering any final decree herein or any amended decree, for the reason that it was without rightful jurisdiction to so render the same, or either of the same."

(See errors page 218, Record case 198, Oct. Term 1897 this court), even if it were a proper question to be determined in this action. It must be very apparent that the question is not one of jurisdiction. The property is within the territorial limits of the jurisdiction of the trial court, and it was not necessary for it to attach it or place it in the hands of a custodian in order to retain jurisdiction. The action was for the enforcement of certain liens against the property, and sale of the property. It is the practice for the court to obtain control of the property in order to render judgment which would bind it, only in cases where it is impossible by non-residence of the owner of the property to obtain personal service on the party so as to obtain a personal judgment against him, and for the purpose of rendering a binding judgment against the property, it is taken into control by the court. But where the parties are all served within the jurisdiction or they come in and submit to the jurisdiction of the court, a judgment against them upon the merits of the controversy binds the property, without the court being in the actual possession of it.

That a judgment agaist the parties to the action who are before the court and have submitted themselves to the jurisdicton of the court binds their property within the territorial limits of the court's jurisdiction, is too elementary to need the citation of authorities.

Now, what the court did in the action of Linn vs. the Gila Bend Reservoir and Irrigation Company, above referred to, was to adjudicate that the said defendant was indebted to the different plaintiffs in certain sums. That judgment immediately impressed its property with the lien of said judgments. The mere fact that the court went further and adjudicated the priority of the various judgments, and decreed that the property held by the trustee might be sold, unless the judgments were paid, would not make the action strictly speaking one *in rem,* for the reason that the judg-

ments were primarily against the parties themselves; the court sitting as a court of equity, had the power to adjudicate whether or not the property was subject to the various liens and the priority of such liens.

It must be borne in mind that the property was within the territorial limits of the court's jurisdiction, and as such could be acted upon by the court, as soon as it by proper process obtained jurisdiction of the parties claiming the title and others interested in the adjudication of the matters involved. The cases cited by the appellant in its brief in the court below are all cases wherein the defendant was a non-resident and there it was rightfully held to bring the proceedings before the court and as an act of assuming jurisdiction the court should take possession of the property in the way of seizing the same and placing it under its control; but in cases where the person of the defendants are within the jurisdiction of the court or submit to its jurisdiction, and the court as in this case, having the jurisdiction to pass upon the subject matter, and in addition thereto the property was within the territorial limits of its jurisdiction, we submit, there is no rule of law which would require of the court as a preliminary step to taking jurisdiction to seize the property and place it under its control.

On the question as to whether or not the court did actually take control of the property and appoint a receiver, we have the admission in the Abstract of Record that a receiver was appointed by the court to take control of the property in suit No. 1728 and we also have the judgment of the court in No. 1996 reciting the fact that the said property was in the hands of its receiver and that said receiver so in possession of the same under the order of the court, should sell the property as therein specified, which he did and the first lien paid from the proceeds of the sale was the receiver's certificates.

FOURTH.

THE APPELLANT NOT HAVING SHOWN ANY TITLE IN ITSELF, CAN NOT AS AGAINST THE APPELLEE IN POSSESSION, QUESTION THE TITLE OF THE APPELLEE.

It is well settled that in actions in the nature of the one at bar, the plaintiff can not depend upon the weakness of the title of the defendant, but must establish a superior title to that of the defendant. In other words, even if the title of the defendant is in some respects weak or faulty, the plaintiff is not in a position to complain, unless the title which he claims is superior, especially so as against one already in possession.

The plaintiff must show such a title in it as would enable it to maintain ejectment against the Gila Water Company.

Ely vs. R. R. Co., 129 U. S. 292 and 293.

Where the court in passing on our statutes on this subject, said:

> "It extends to cases in which the plaintiff is out of possession, and the defendant in possession and which at common law the plaintiff might have maintained ejectment."
>
> Holland vs. Challen, 110 U. S. 15 on 25.
> Frost vs. Spitley 121 U. S. 552 on 556.
> Dick vs. Foraker, 155 U. S. 404 on 414.

The defendant, the Gila Water Company, being in actual possession of the property in question that alone is sufficient proof of title in it to authorize the relief prayed for in its cross-complaint, there being no proof of title in the plaintiff.

Gage vs. Schmidt, 104 Ill. 106.
Brener vs. Biglow, 8 Kansas 496 * page.
Detlor vs. Holland, 40 L. R. A. 260 on 268.

The testimony introduced on the trial, and which stands uncontradicted is to the effect that the Gila Water Company, has been for a long time and now is in possession of all the property set forth in the complaint.

In addition to that, the Abstract of Record also shows that the appellant, the Gila Bend Reservoir and Irrigation Company conveyed what rights it had in the property to the Peoria Canal Company, and there is not one single iota of evidence that the Peoria Canal Company ever deeded the property back to the appellant, and as a matter of fact the appellee's title to a portion of the property is deraigned through the Peoria Canal Company, to whom the property was conveyed as above mentioned. (Transcript of Record, folio 20).

We therefore find the record showing very conclusively a conveyance of the property, divesting the appellant of any right it had in the property, and in the attempt to recover which it was defeated. That being so, and the appellee being in possession claiming ownership and establishing such ownership through mesne conveyances through the very party to whom the property was conveyed, the appellant stands as a stranger to the title and can not question the decree of the court below establishing the title of the appellee, it being, by reason of its conveyance of its own rights in the property, in the same position as any stranger to the title would be.

All of the other questions raised by the appellant in its brief in the court below relating to the court's losing jurisdiction upon the filing of the motion for change of venue, and the question of the entry of the judgment after the appeal, were before this court in case No. 1996, as will more

fully appear from the record in that case, and this court upon said appeal affirmed the judgment of the court below, directly passing on all the questions which are attempted to be argued by the appellant in this case.

We therefore submit that the Supreme Court of Arizona did not err in affirming the judgment of the trial court and its judgment should be by this court affirmed.

Respectfully submitted,

C. F. AINSWORTH,
Attorney for Appellee.